Supreme Court, U.S.

No. 09-955

In the Supreme Court of the United States

RICHARD LAWRENCE ALEXIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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An alien who has been convicted of an aggravated felony is ineligible, *inter alia*, for the discretionary relief of cancellation of removal. 8 U.S.C. 1229b(a)(3). Under 8 U.S.C. 1101(a)(43)(B), an "aggravated felony" includes any "drug trafficking crime," which is defined in 18 U.S.C. 924(c)(2) to include any "felony punishable under the Controlled Substances Act." Under one provision in the Controlled Substances Act, 21 U.S.C. 844(a), a person who commits a drug possession offense after his conviction for a prior drug offense has become final may be punished as a felon.

Petitioner is an alien who was found to be removable from the United States and sought cancellation of removal. Pet. App. 9-12. Petitioner had been convicted of a state drug possession offense after a prior state drug possession conviction had become final. *Id.* at 5-6, 10-11; see Pet. 5, 14-15. The immigration judge determined

that petitioner's second drug possession offense qualifies as an "aggravated felony" that made him ineligible for cancellation of removal. Pet. App. 12. The Board of Immigration Appeals and the court of appeals upheld that determination. *Id.* at 2-3, 5-7.

Petitioner contends (Pet. 16-26) that his second drug possession offense does not qualify as "aggravated felony" because the state court did not sentence him as a recidivist, using procedures like those applicable in federal court, in the prosecution for his second drug possession offense. On December 14, 2009, this Court granted certiorari in *Carachuri-Rosendo* v. *Holder*, No. 09-60, to address whether a second or subsequent state offense of possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State actually applied a recidivist sentencing enhancement, using procedures like those applicable in federal court, in the prosecution for the second or subsequent offense. Because this petition presents the same question as *Carachuri-Rosendo*, it should be held pending this Court's resolution of *Carachuri-Rosendo*, and then disposed of as appropriate in light of the decision in that case.*

Respectfully submitted.

ELENA KAGAN
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* The government waives any further response to the petition unless the Court requests otherwise.